UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DAVID J. WIDI, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	2:12-cv-00188-JAW
	)	
PAUL MCNEIL, et al.,	)	
	)	
Defendants.	)	

SCREENING ORDER, ORDER VACATING IN PART EARLIER ORDER DENYING MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT AS TO SERVED DEFENDANTS, ORDER GRANTING IN PART MOTION TO FILE SECOND AMENDED COMPLAINT, ORDER STRIKING PORTIONS OF THE SECOND AMENDED COMPLAINT, AND ORDER DENYING MOTION TO STAY

David J. Widi, Jr. is a bright and tenacious pro se litigator, who has a knack for creating procedural tangles. This case is no exception. After reconsidering its prior denial, the Court grants Mr. Widi's motion for leave to file a second amended complaint. However, in performing a § 1915A screening, the Court concludes that only a few of the counts in the Second Amended Complaint survive and that the Second Amended Complaint states a viable claim against only two additional potential Defendants.

I. BACKGROUND

On December 10, 2014, the Court issued an order in this procedural morass, confirming that, pursuant to 28 U.S.C. § 1915A, the Court would screen the Defendants not screened by the Magistrate Judge's July 13, 2012 Order for Service After Screening Complaint Pursuant to 28 U.S.C. § 1915A. *Order Dismissing Pl.'s*

Mot. for Relief Pursuant to Fed. Rule of Civil Procedure 54(b), Denying in Part and Granting in Part Pl.'s Mot. for Recons., Denying Req. for Status Conference and Granting Mot. to Extend Time at 6-8 (ECF No. 268) (*Dec. 10, 2014 Order*). In her July 13, 2012 Order, the Magistrate Judge had authorized the United States Marshal to serve Special Agent Paul McNeil, TD BankNorth, N.A. (TD Bank), Special Agent Kevin Curran, Maine Probation Agent Denis R. Clark, and Maine Probation Agent Michael Lyon. *Order for Serv. After Screening Complaint Pursuant to 28 U.S.C. § 1915A* at 1 (ECF No. 6) (*Screening Order*). But she deferred ruling on the more than thirty remaining Defendants. *Id.* at 1-2.

In addition, on November 18, 2013, without filing a motion to amend or consent, Mr. Widi filed a second amended complaint. *Second Am. Compl.* (ECF No. 191). On November 19, 2013, the Magistrate Judge struck the Second Amended Complaint because under Federal Rule of Civil Procedure 15(a)(2), Mr. Widi could amend his First Amended Complaint only by the parties' written consent or upon leave of the Court and he had failed to present either. *Order* at 1 (ECF No. 192). Mr. Widi objected to the striking of his Second Amended Complaint and on December 13, 2013, he filed a motion for reconsideration. *Mot. for Recons.* (ECF No. 197).

In the meantime, on November 29, 2013, Mr. Widi filed a motion to amend the First Amended Complaint. *Mot. for Leave to Amend* (ECF No. 198). On September 13, 2014, the Court dismissed Mr. Widi's motion for reconsideration and denied his motion to amend the Amended Complaint. *Order Dismissing Pl.'s Mot. for Recons. and Denying Pl.'s Mot. to Amend Am. Compl.* (ECF No. 255) (*Sept. 13, 2014 Order*).

On October 20, 2014, Mr. Widi filed a motion to reconsider the September 13, 2014 Order. *Mot. for Recons. of Order Denying Leave to File Second Am. Complaint and Req. for Status Conference* (ECF No. 261) (*Second Mot. for Recons.*). Finally, on December 10, 2014, the Court indicated that it would review the allegations in the First Amended and Second Amended Complaints and determine whether any differences between the two were legally significant. *Dec. 10, 2014 Order* at 8.

A. Screening Standards

While the federal in forma pauperis statute, 28 U.S.C. § 1915, is designed to ensure meaningful access to the federal courts for persons unable to pay the costs of bringing an action, Congress directed that a district court "shall dismiss . . . at any time" cases or claims proceeding in forma pauperis, if the court determines that the action "fails to state a claim on which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii). "Dismissals on these grounds are often made sua sponte prior to the issuance of process, so as to spare prospective defendants the inconvenience and expense of answering such complaints." *Neitzke v. Williams,* 490 U.S. 319, 324 (1989).

"Ordinarily, before dismissal for failure to state a claim is ordered, some form of notice and an opportunity to cure the deficiencies in the complaint must be afforded." *Brown v. Rhode Island*, 511 Fed. Appx. 4, 5 (1st Cir. 2013). However, "no such safeguards need be provided if it is 'crystal clear that . . . amending the complaint would be futile,' i.e., if the complaint is 'patently meritless and beyond all hope of redemption.'" *Id.* (quoting *Gonzalez–Gonzalez v. United States,* 257 F.3d 31, 37 (1st Cir. 2001)).

B. The First Amended Complaint

In addition to Special Agent Paul McNeil of the Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF), Mr. Widi's First Amended Complaint included the following ATF special agents as defendants:

(1) Stephen E. Hickey, Jr.;

(2) Christopher J. Durkin;

(3) Dale L. Armstrong;

(4) Brent McSweyn;

(5) Glenn N. Anderson;

(6) Grasso;

(7) Morris; and

(8) Kirk.

In addition to Special Agent Kevin Curran, the First Amended Complaint listed the following Maine Drug Enforcement Agency (MDEA) special agents as defendants:

(9) Paul Shaw;

(10) Scott C. Rochefant;

(11) Scott Durst;

(12) Stephen Borst; and

(13) Steve Mazziotti.

The First Amended Complaint listed the following town of Eliot Police Department (EPD) law enforcement Defendants:

(14) Chief Theodore Strong;[1]

(15) Lieutenant Kevin Cady;

(16) Detective Kevin Curran;[2]

(17) Officer Robert Brown;

(18) Officer Elliott Moya;

(19) Officer Adam C. Martin; and

(20) Officer Matthew Raymond.

The First Amended Complaint listed the following Maine State Police (MSP) Defendants:

(21) Corporal Jerome Carr;

(22) Trooper Michael Cook; and

(23) John Doe 1.

The First Amended Complaint listed the following Portsmouth, New Hampshire Police Department (PPD) Defendants:

(24) Lieutenant Dante Puopolo; and

(25) Officer Andre S. Wassouf.

The First Amended Complaint listed the following Somersworth, New Hampshire Police Department (SPD) Defendants:

(26) Detective Thomas Phelan;

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[1] In the First Amended Complaint, Mr. Widi identifies the Chief of the EPD as Theodore Strong and Theodore Short. *See First Am. Compl.* at 2, 13-14. In the Second Amended Complaint, he identifies the Chief as Theodore Short. *See Second Am. Compl.* at 6.

[2] The First Amended Complaint does not clarify whether MDEA Special Agent Kevin Curran is the same person as Detective Kevin Curran of the town of Eliot Police Department. In her screening order, the Magistrate Judge authorized service of process on Special Agent Kevin Curran. *Screening Order* at 1-2.

(27) John Doe 2; and

(28) John Doe 3.

The First Amended Complaint listed the following U.S. Marshal Defendants from the Concord, New Hampshire office:

(29) John Doe 4; and

(30) John Doe 5.

In addition to TD Bank, the ATF, the Executive Office for the United States Attorneys (EOUSA), and the Office of Information Policy (OIP), and Probation Officers Clark and Lyon, the First Amended Complaint listed the following additional Defendants:

(31) United States Attorney's Office, Portland, Maine;

(32) Town of Eliot, Maine;

(33) Douglas Lara, Bronx, New York;

(34) Neil Vaccaro, Portsmouth, New Hampshire; and

(35) Ryan Cortina, Somersworth, New Hampshire.

II. FURTHER BACKGROUND

A. Introduction

Mr. Widi's fourteen-count First Amended Complaint concerns the circumstances surrounding his arrest, detention, and prosecution in the fall of 2008. *First Am. Compl.* at 1-22 (ECF No. 15). The First Amended Complaint references numerous events in his federal prosecution, *United States v. Widi*, 2:09-cr-00009-GZS, and, to provide context, the Court reviews the history of that criminal case. The Court then describes the allegations in the First Amended Complaint and the

proposed eighteen-count Second Amended Complaint. Finally, the Court compares the allegations in the First Amended Complaint with the allegations in the proposed Second Amended Complaint.

B. *United States v. Widi*[3]

On November 28, 2008, ATF agents applied for and obtained a search warrant allowing them to search the premises at 150A Harold Dow Highway, Eliot, Maine. *Order on Mot. for to Suppress and Supplemental Mot. to Suppress* at 1 (ECF No. 136) (*Suppression Order*); *Mot. to Suppress Evid.* at 1 (ECF No. 92) (*Mot. to Suppress*). The warrant authorized the police to search for drug-related evidence and firearms and explosives. *Id.* Before executing the search warrant, the agents maintained surveillance over the residence and observed a vehicle leave the premises and proceed to a local Irving station. *Id.* There, the agents stopped Mr. Widi, who was walking out of the Irving station, placed him in handcuffs, and Agent Paul McNeil explained to Mr. Widi that they were going to execute a search warrant on his house. *Id.* Mr. Widi said he would like to be present during the search. *Suppression Order* at 2. Accordingly, the agents transported him by cruiser to 150A Harold Dow Highway in Eliot as the search proceeded. *Id.* During the search, the agents found ammunition and a gun safe as well as a marijuana grow operation. *Id.* at 2-3.

Mr. Widi's "van was parked outside of the apartment in the driveway." *Id.* at 3. "A trained K-9 unit performed a sniff test on the exterior of the van but did not

[3] For purposes of Section II.B only, the Court's ECF docket entry references are to docket number 2:09-cr-00009-GZS. Otherwise, if the Court references an ECF docket entry from docket number 2:09-cr-00009-GZS, the Court notes it.

alert positively for controlled substances." *Id.* Agent McNeil arranged to have the van towed to an impound lot and, once there, a second drug-detection dog performed a second sniff test. *Id.* This time, the dog alerted positively on the van and, after a second search warrant was issued authorizing search of the van, the officers searched it and "found a small box of ammunition, a small baggie containing marijuana, and a few marijuana roaches." *Id.*

On November 28, 2008, Christopher J. Durkin, Special ATF Agent, swore out a criminal complaint against Mr. Widi. *Criminal Compl.* (ECF No. 1). The Complaint alleged that Mr. Widi had been convicted of Reckless Conduct on December 15, 2004 in the state of New Hampshire and that on about November 28, 2008, he possessed four firearms: (1) a Weatherby, Model Vanguard, .300 Magnum bolt-action rifle, (2) a Maaci Co., unknown model, 7.62 x 39 rifle, (3) an Israeli Weapons Industry, Model Desert Eagle, .50 pistol, and (4) a Davis Industries, Model D-32, .32 two-shot pistol, all in violation of the federal criminal law, 18 U.S.C. § 922(g)(1), that prohibits possession of firearms by felons. *Id.* at 1. The Government filed a motion for detention with the Complaint. *Mot. for Detention* (ECF No. 3). Mr. Widi was temporarily detained pursuant to that motion and after a hearing, he was ordered detained pending trial on December 11, 2008. *Order of Detention Pending Trial* (ECF No. 13).

A federal grand jury indicted Mr. Widi for the same crime on January 6, 2009, except the number of weapons was expanded to add (1) a Bushmaster, Model M17S, .223 semi-automatic rifle, (2) a Winchester, Model 94, 30-30 rifle, and (3) an Israel

Military Industries, Model Uzi, 9mm pistol, and added a forfeiture allegation for the weapons. *Indictment* at 1-2 (ECF No. 14). The grand jury also indicted Mr. Widi for manufacturing marijuana, a violation of 21 U.S.C. § 841(a)(1). *Id.* at 2.

On December 8, 2009, Mr. Widi filed a motion to suppress evidence. *Mot. to Suppress*. The motion to suppress was based on the following claims: (1) that the affidavit that formed the basis for the issuance of a search warrant to a premises located at 150A Harold Dow Highway, Eliot, Maine, did not establish probable cause for the search, (2) that the agents arrested Mr. Widi without probable cause, and (3) that the agents did not advise Mr. Widi of his *Miranda*[4] rights before they questioned him and elicited incriminating statements. *Id.* at 1-4. On February 2, 2010, Mr. Widi filed a supplementary motion, seeking to have the results of the van search suppressed. *Supplemental Mot. to Suppress Evid.* (ECF No. 117). A testimonial hearing on both the motion to suppress and the supplemental motion to suppress was held on February 22, 2010. *Tr. of Proceedings* (ECF No. 155) (*Suppression Tr.*).

On February 23, 2010, the district court concluded that the affidavit supporting the search warrant of the apartment was sufficient, and even if not, the evidence need not be suppressed under the good faith exception in *United States v. Leon*, 468 U.S. 897, 922 (1984). *Suppression Order* at 4-6. The district court denied the motion to suppress the evidence found in the apartment as a result of the execution of the search warrant. *Id.* at 5-6.

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[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

The district court next addressed the admissibility of statements that Mr. Widi made to the police officers both before and after *Miranda* warnings were issued. The district court concluded that statements Mr. Widi made to the officers before they issued *Miranda* warnings were statements made while he was in custody and subjected to interrogation and the district judge suppressed those statements. *Id.* at 8. However, after marijuana and ammunition was found in Mr. Widi's apartment, "Agent McNeil notified [Mr. Widi] that he was under arrest and read him *Miranda* warnings." *Id.* The district court concluded that the statements Mr. Widi made to the police after being read his *Miranda* warnings were admissible. *Id.* at 10. Lastly, the district court concluded that the search of the van was impermissible and suppressed evidence obtained from the van search. *Id.* at 11-12.

On April 7, 2010, a grand jury issued a second superseding indictment, which contained the same charges but added (1) one hundred rounds of Winchester, 9mm Luger ammunition, (2) one round of Winchester Western, 32 caliber auto ammunition, (3) one round of Remington Peters, 32 caliber auto ammunition, and (4) six rounds of Speer, 50 caliber AE ammunition. *Second Superseding Indictment* (ECF No. 181). Beginning April 19, 2010, this case was presented to a federal jury and on April 20, 2010, the jury issued a verdict finding Mr. Widi guilty of both criminal charges. *Verdict Form* (ECF No. 205). On October 13, 2010, the district judge sentenced Mr. Widi to two concurrent terms of imprisonment: 108 months on Count One, the gun possession count, and 60 months on Count Two, the marijuana count. *J.* (ECF No. 258). Mr. Widi appealed his convictions and sentence to the First Circuit

Court of Appeals and on July 6, 2012, the First Circuit affirmed the convictions and sentence, upholding the district court's ruling on the motion to suppress. *United States v. Widi*, 684 F.3d 216, 221-22, 226 (1st Cir. 2012).

C. The First Amended Complaint

1. Counts One and Two: False Arrest and False Imprisonment Against the ATF, MDEA, EPD and MSP Defendants

In Counts One and Two, Mr. Widi alleges that on the morning of November 28, 2008, "the ATF defendants, MDEA defendants, Eliot Police defendants, and the Maine State Police defendants gathered for a briefing prior to the execution of a search warrant on Mr. Widi's residence" and "hatched a plot to initiate a traffic stop and arrest Mr. Widi for driving without a license." *First Am. Compl.* at 4. He claims that, when he left the premises, these law enforcement officers arrested him at the Irving station when they knew they did not have probable cause to make an arrest. *Id.* at 4-5.

2. Count Three: Excessive Force Against Eliot Police Officer Robert Brown, Special Agents Kevin Curran and Paul McNeil, and Eliot Police Lieutenant Kevin Cady

In Count Three, Mr. Widi alleges that he told Eliot Police Officer Brown and Special Agent Curran that the handcuffs were on too tight and were hurting him. *Id.* at 5-6. He also claims that Special Agent McNeil and Lieutenant Cady "refused to loosen the handcuffs." *Id.* at 6. Mr. Widi says he was required to wear overtightened handcuffs for over an hour and he still suffers from wrist pain to this day. *Id.*

3. Count Four: Van Seizure Against ATF, MDEA, EPD, and MSP Defendants

Noting that the district judge concluded that the police seizure of the van was not authorized, Count Four alleges that the police unlawfully seized his van in violation of his Fourth, Fifth, and Fourteenth Amendment rights. *Id.* at 6-7.

4. Count Five: Omission of Probable Cause Factors Against ATF, MDEA, EPD, and MSP Defendants

In Count Five, Mr. Widi claims that when the drug-sniffing dog was first taken to his company van, it failed to alert on the van. *Id.* at 7. However, the affidavit for the search of the van did not mention the first, negative alert. *Id.*

5. Count Six: Illegal Search and Seizure, Deprivation of Property Without Due Process, and Omission of Probable Cause Facts Against ATF, MDEA, EPD, MSP, PPD Defendants and Neil Vaccaro

In Count Six, Mr. Widi asserts that while conducting the warranted search, the police searched a grey trailer that was on the premises at 150A Harold Dow Highway and found a 2000 Harley Davidson DynaWide Glide. *Id.* at 8. He claims they "seized the motorcycle and removed it to an impound lot." *Id.* In addition, he accuses Special Agent McNeil and Special Agent Curran of telling Neil Vaccaro to lie about the status of the motorcycle's ownership. *Id.*

6. Count Seven: False Evidence Against ATF, MDEA, EPD, and MSP Defendants

In Count Seven, Mr. Widi accuses law enforcement of manufacturing evidence of "ammunition strewn throughout the residence." *Id.* at 9-10. He claims that during the trial, it was demonstrated that the evidence was false "by the alarm clock in the background of the video." *Id.* at 10. He asserts that the Defendants "generated

documents stating that a box of .45 caliber slugs was found on the passenger seat of Mr. Widi's tile company van, however photographs taken prior to the search clearly indicate that is false because a laundry basket was occupying the passenger seat." *Id.* He also contends that the Defendants planted the marijuana plants in his apartment. *Id.*

7. Count Eight: Self-Incrimination and Deprivation of Counsel Against Paul McNeil, Kevin Curran, and Kevin Cady

In Count Eight, Mr. Widi says that he demanded counsel when he was taken into custody at the Irving station on November 28, 2008 and when he was at the scene of the execution of the search warrant. *Id.* at 11. He claims Defendants McNeil, Curran, and Cady all refused to allow him to contact his attorney and instead continued to question him. *Id.* When he arrived at the Eliot Police Station, he says that an attorney was provided but he was not allowed to consult with his lawyer in privacy. *Id.* at 12. He alleges that Defendant McNeil later became upset when he learned that Mr. Widi had been given counsel and continued to question Mr. Widi. *Id.* Furthermore, Mr. Widi asserts that the information gathered after deprivation of counsel was admitted during the later criminal trial. *Id.*

8. Count Nine: Unconstitutional Defamation/Libel Against Eliot Police Chief Theodore Short, Paul McNeil, Neil Vaccaro, and Douglas Lara

In Count Nine, Mr. Widi claims that Defendants Short and McNeil told the media that the search had uncovered a "stolen motorcycle," and that Defendants McNeil, Short, Vaccaro and Lara asserted that Mr. Widi was "ready for war" and

"preparing for the end of the world," when they knew that information was false. *Id.* at 13. He claims defamation, slander, and libel damages against Defendants Short and McNeil. *Id.* at 14.

9. Count Ten: Municipal Liability Against the town of Eliot

Count Ten claims that the town of Eliot failed to properly train and supervise the Eliot Police Defendants in arrest procedures, in the use of restraints, and in providing a place for arrestees to speak confidentially with their attorneys. *Id.* at 14-15.

10. Count Eleven: Right to Financial Privacy Against TD Banknorth, N.A.

Count Eleven alleges that TD Bank provided the U.S. Attorney's Office with Mr. Widi's financial records without following proper procedure, in violation of 12 U.S.C. § 3401 *et seq.* *Id.* at 15.

11. Count Twelve: Conspiracy to Deprive Compulsory Process and Civil RICO Against Paul McNeil, Kevin Curran, the SPD, the United States Marshal's Office Deputy Marshals, and Ryan Cortina

Count Twelve asserts a conspiracy to deprive compulsory process and a civil RICO violation. *Id.* at 16-18. This Count makes allegations about police interference with two potential witnesses: (1) Josh Eastman, and (2) Travis Webber. Mr. Widi claims that on or about November 28, 2008, Special Agent Curran "contacted Josh Eastman and asked him to come to the Eliot Police Station." *Id.* at 16. He says that when Mr. Eastman arrived, Special Agent Curran asked him about Mr. Widi and, when Mr. Eastman said that he had no information, he told Mr. Eastman to "make

something up." *Id.* Special Agent Curran supposedly told Mr. Eastman that if he did not assist in the prosecution of Mr. Widi, Special Agent Curran would make certain that Mr. Eastman would lose his job with the Department of Defense. *Id.* When Mr. Eastman persisted, Special Agent Curran allegedly contacted the Department of Defense and caused Mr. Eastman to be fired. *Id.* Mr. Widi claims that because of Special Agent Curran's threats, Mr. Widi's defense counsel declined to call Mr. Eastman at trial to testify that he had seen one of the firearms in the possession of government witness Douglas Fairbanks shortly before Mr. Widi's arrest. *Id.*

Regarding Mr. Webber, Mr. Widi alleges that Special Agent McNeil, two Deputy U.S. Marshals, and members of the Somerville New Hampshire Police Department "conspired to have Mr. Webber arrested on trumped up charges to thwart his testimony at Mr. Widi's trial." *Id.* at 17. He claims that these Defendants "enlisted a drug informant, named Ryan Cortina, to say that Mr. Webber had robbed him." *Id.* Mr. Widi asserts that Special Agent McNeil went to Mr. Webber and threatened him about testifying. *Id.* Mr. Widi admits that Mr. Webber ended up testifying at his trial, but he observes that Mr. Webber was forced to wear prison garb and the jury was told that he was in jail. *Id.* Furthermore, Mr. Widi alleges that Mr. Webber was never indicted on the charges and he asserts that the Defendants "falsely arrested Mr. Webber" and thereby "[a]ffected Mr. Widi by undermining the credibility of his witness." *Id.*

12. Count Thirteen: Illegal Probation Search Against Probation Officers Denis Clark and Michael Lyon and EPD Detective Kevin Curran

In Count Thirteen, Mr. Widi charged that Probation Officers Clark and Lyon, along with EPD Detective Curran, engaged in an illegal search of his residence when he was not home. *Id.* at 18-19.

13. Count Fourteen: Improper Withholding of FOIA/PA Documents Against ATF and the EOUSA

In Count Fourteen, Mr. Widi alleged that ATF and the EOUSA failed to properly respond to his Freedom of Information Act (FOIA) and Privacy Act (PA) requests. *Id.* at 19-21.

D. The Second Amended Complaint

1. The Parties

In his Second Amended Complaint, Mr. Widi adds Widi Tile Company, LLC as a plaintiff.[5] *Second Am. Compl.* at 2. He lists the following Defendants:

(1) The United States;

(2) The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF);

(3) Paul Joseph McNeil, a special agent for ATF;

(4) Dale L. Armstrong, a resident agent for ATF;

(5) Glenn N. Anderson, a special agent for ATF;

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[5] In his Second Amended Complaint, Mr. Widi lists Travis Webber and Joshua Eastman as parties, claiming that law enforcement retaliated against each. *Second Am. Compl.* at 2-3. At the end of the Second Amended Complaint, however, Mr. Widi does not attempt to make a claim against any of the Defendants on behalf of either Mr. Webber or Mr. Eastman. *Id.* at 63-69. At the same time, Mr. Widi lists Mr. Webber and Mr. Eastman as parties and there is no indication that he is suing them. To the extent Mr. Widi is attempting to state a claim on behalf of Mr. Webber or Mr. Eastman, the Court DISMISSES each of them as parties from the lawsuit. *See* 28 U.S.C. § 1654 (providing in part that "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel"); *O'Diah v. Volkswagen of Am., Inc.*, 91 Fed. Appx. 159, 160 (1st Cir. 2004) ("We have interpreted this statute [28 U.S.C. § 1654] as barring a non-lawyer from representing anyone but himself"). *See also Order Denying Mot. to Appoint Counsel* (ECF No. 190) (denying Mr. Webber's motion to join action as plaintiff).

(6) Christopher J. Durkin, a special agent for ATF;

(7) Stephen E. Hickey, Jr., a special agent for ATF;

(8) Brent McSweyn, an ATF employee;

(9) Michael Grasso, an ATF employee;

(10) John Morris, an ATF employee;

(11) Douglas Kirk, an ATF employee;

(12) The town of Eliot, Maine;

(13) The town of Eliot, Maine's Police Department (EPD);

(14) Theodore Short, the Chief of the EPD;

(15) Kevin Cady, a lieutenant at the EPD;

(16) Robert Brown, an officer at the EPD;

(17) Elliot Moya, an officer at the EPD;

(18) Adam C. Martin, an officer at the EPD;

(19) Matthew Raymond, an officer at the EPD;

(20) Kevin Curran, a detective at the EPD;

(21) The Maine Drug Enforcement Agency (MDEA);

(22) Paul Shaw, an MDEA Agent;

(23) Scott C. Rochefant, an MDEA Agent;

(24) Scott Durst, an MDEA Agent;

(25) Steve Mazziotti, an MDEA Agent;

(26) Stephen Borst, a supervising special agent with MDEA;

(27) The Maine State Police (MSP);

(28) Jerome Carr, a corporal with the MSP;

(29) Michael Cook, a trooper with the MSP;

(30) John Doe # 1, an employee of the MSP;

(31) Douglas Lara, a prisoner at the New Hampshire State Prison;

(32) Neil Vaccaro, a confidential informant;

(33) The Portsmouth, New Hampshire Police Department (PPD);

(34) Andre Wassouf, a patrol officer with the PPD and personal friend of Neil Vaccaro;

(35) Dante Puopolo, a lieutenant with the PPD;

(36) The United States Marshal's Service;

(37) John Doe # 4, a deputy marshal with the United States Marshal's Service;

(38) John Doe # 5, a deputy marshal with the United States Marshal's Service;

(39) The Somersworth, New Hampshire Police Department (SPD);

(40) Thomas Phelan, a detective with the SPD;

(41) John Doe # 2, an officer with the SPD;

(42) John Doe # 3, an officer with the SPD;

(43) Ryan Cortina, a confidential informant for the SPD;

(44) The Executive Office of the United States Attorney (EOUSA);

(45) The Office of Information Policy (OIP);

(46) The United States Attorney's Office for Maine;

(47) TD BankNorth, N.A. (TD Bank);

(48) The Maine Probation Department;

(49) Denis R. Clark, a probation officer with the Maine Probation Department; and

(50) Michael Lyon, a probation officer with the Maine Probation Department.

Id. at 1-16.

2. Count One: Unlawful Seizure of Mr. Widi Against ATF, MDEA, EPD, and MSP Defendants

In Count One of his Second Amended Complaint, Mr. Widi reiterates his allegation that he was unlawfully seized. *Id.* at 17-19. In one of his motions for reconsideration, Mr. Widi explains that the First Amended Complaint neglected to allege "the commission of an actual tort," but he agrees that "this amendment is not significant unless this Court were to decide to revise it[]s position under Rule 54(b) or a precedential ruling were to come down." *Second Mot. for Recons.* at 3-4. He concedes that he "left this Count in the Second Amended Complaint as he did not want it to be deemed waived." *Id.* at 4.

3. Count Two: Excessive Force Against Robert Brown, Paul McNeil, Kevin Curran, Kevin Cady, and Elliot Moya

In Count Two of his Second Amended Complaint, Mr. Widi restates his excessive force claim. *Second Am. Compl.* at 20-22. Mr. Widi says that Count Two adds "new critical allegations against [Eliot Police Officer Robert] Brown, specifically that the force was maliciously applied to cause harm." *Second Mot. for Recons.* at 4.

According to Mr. Widi, it also alleges facts necessary to make "a claim of supervisory liability against Curran and Cady as well as states a failure to intervene theory of liability against Curran, Cady, and Moya." *Id.* He also says that Count Two makes similar allegations against Special Agent McNeil. *Id.*

4. Count Three: Illegal Search of the Van Against ATF, MDEA, EPD, and MSP Defendants

Count Three of the Second Amended Complaint is a new count. It relates to the "sniff search" by the dog of Mr. Widi's company van, which was parked in his driveway. *Second Am. Compl.* at 23-24. In his motion for reconsideration, he says that the "Second Amended Complaint adds an entirely new claim that the ATF, MDEA, EPD, and MSP [D]efendants met and agreed to subject Mr. Widi's van to a sniff search in violation of the Fourth Amendment." *Second Mot. for Recons.* at 5. He points out that as the evidence in the van was suppressed, "the Heck bar would not be applicable as his prevailing on this claim would not imply the invalidity of his conviction." *Id.*

5. Count Four: Illegal Seizure of the Van Against ATF, MDEA, EPD, and MSP Defendants

In Count Four of the Second Amended Complaint, Mr. Widi alleges that law enforcement illegally seized his company van. *Second Am. Compl.* at 25-26. In his motion for reconsideration, he says that the "Second Amended Complaint adds specific factual allegations that the ATF, MDEA, EPD, and MSP Defendants 'met and agreed' to subject Mr. Widi's van to an unlawful seizure and these allegations are necessary to successfully state a conspiracy claim." *Second Mot. for Recons.* at 5-6.

He also says that the Second Amended Complaint specifies damages that flowed from the illegal seizure. *Id.* at 6. Turning to the allegations in Count Four, Mr. Widi says that his company van held the tools for his tile business and that he was in the process of working several tiling contracts, and by the seizure of the van, "deprived access to tools necessary to complete those jobs," "prevented [him] from enforcing his contracts as he was deprived access to those contracts," and the Eliot Police Department forced him to pay over $300 to obtain release of the van and the items in his van. *Second Am. Compl.* at 26.

6. Count Five: Second Illegal Search of Van Against ATF, MDEA, EPD, and MSP Defendants

In Count Five of his Second Amended Complaint, Mr. Widi alleges that law enforcement allowed a second sniff search of his company van on November 30, 2008. *Second Am. Compl.* at 27-28. Mr. Widi says that the second sniff search was not authorized by the search warrant and that he is entitled to damages for a constitutional violation. *Id.* He also points out that because evidence from the van was suppressed, "the Heck bar would not be applicable." *Second Mot. for Recons.* at 7.

7. Count Six: Omissions in Search Warrant Affidavit Against ATF, MDEA, EPD, and MSP Defendants

In Count Six of the Second Amended Complaint, Mr. Widi renumbers Count Five of his First Amended Complaint, which alleged that law enforcement improperly omitted probable cause factors in its affidavit to the state of Maine to authorize a search of his company van; specifically, he says that the affidavit failed to mention

the earlier failed sniff search. *First Am. Compl.* at 7; *Second Am. Compl.* at 29. In his motion for reconsideration, Mr. Widi explains that the Second Amended Complaint clarifies that he is alleging a conspiracy, that the omission of the prior negative sniff was part of the conspiracy, and that Agent McNeil was part of the conspiracy. *Second Mot. for Recons.* at 7-8.

8. Count Seven: Illegal Trailer Search Against ATF, MDEA, EPD, and MSP Defendants

In Count Seven of the Second Amended Complaint, Mr. Widi inserts a new count, which asserts that law enforcement improperly searched his grey trailer. *Second Am. Compl.* at 30. In his motion for reconsideration, Mr. Widi explains that the grey trailer "had not been listed on the federal search warrant," and therefore, its search was improper. *Second Mot. for Recons.* at 8-9. He also observes that "the search of the grey trailer did not result in evidence that was [used] against Mr. Widi at his criminal trial and, therefore, the Heck bar is not applicable." *Id.* at 8.

9. Count Eight: Illegal Seizure of Motorcycle Against ATF, MDEA, EPD, and MSP Defendants

In Count Eight of the Second Amended Complaint, Mr. Widi inserts an entirely new count, which asserts that law enforcement improperly seized a motorcycle (Vaccaro motorcycle) that Mr. Widi lawfully held. *Second Am. Compl.* at 31-32. Mr. Widi alleges that the search warrant did not authorize the seizure of the motorcycle and that he had held the motorcycle as collateral for a $5,000 loan that he had made to Neil B. Vaccaro. *Id.* In his motion for reconsideration, Mr. Widi asserts that the new count alleges that law enforcement conspired with Mr. Vaccaro to seize the

motorcycle and that Mr. Widi has suffered damages as a consequence of the seizure. *Second Mot. for Recons.* at 9.

10. Count Nine: Due Process Claim Regarding Motorcycle Against ATF, MDEA, EPD, and MSP Defendants

In Count Nine of the Second Amended Complaint, Mr. Widi inserts another entirely new count, which asserts that he was deprived of property without due process of law. *Second Am. Compl.* at 33-35. Here, he is again referring to the Vaccaro motorcycle. *Id.* In Count Nine, he expands the motorcycle allegation by asserting that on December 4, 2008, Mr. Vaccaro contacted the Portsmouth Police Department seeking his motorcycle and he alleges that Mr. Vaccaro was told by Officer Andre Wassouf that in order to repossess the motorcycle, he would have to make out a report alleging that Mr. Widi stole it. *Id.* at 34-35. He claims that this false report was approved by Lieutenant Dante Puopolo. *Id.* at 35. Mr. Widi also says that he was never charged with theft of the motorcycle or receiving stolen property. *Id.* Furthermore, Mr. Widi asserts that the Portsmouth Police Department handed over the motorcycle to Mr. Vaccaro. *Id.*

11. Count Ten: Defamation and Libel Against Theodore Short, Paul McNeil, Neil Vaccaro, and Douglas Lara

In Count Ten of the Second Amended Complaint, Mr. Widi renumbers and reasserts Count Nine of the First Amended Complaint, which claimed unconstitutional defamation and libel. *First Am. Compl.* at 13-14; *Second Am. Compl.* at 36-38. In his motion for reconsideration, Mr. Widi explains that the "Second Amended Complaint adds new critical allegations and theories against Short

and McNeil to make a claim that meets the 'defamation plus' test." *Second Mot. for Recons.* at 10 (citing *Celia v. O'Malley*, 918 F.2d 1017, 1021 (1st Cir. 1990)). Here, Mr. Widi is focused on statements made by Chief Short and Special Agent McNeil to the media, asserting that the police had found a stolen motorcycle during the search of the grey trailer. *Id.* Mr. Widi reiterates his earlier contention that the defamatory statements included that he was "ready for war" or "preparing for the end of the world" and that he was "stockpiling" firearms and explosives. *Id.* at 11.

12. Counts Eleven and Twelve: False Evidence Against ATF, MDEA, EPD, and MSP Defendants; Deprivation of Right to Counsel and Self-Incrimination Claims Against Paul McNeil, Kevin Curran, and Kevin Cady

In Counts Eleven and Twelve of the Second Amended Complaint, Mr. Widi re-alleged the same false evidence and deprivation of counsel/self-incrimination claims that appeared in Counts Seven and Eight of the First Amended Complaint. *First Am. Compl.* at 9-13; *Second Am. Compl.* at 39-44. In his motion for reconsideration, Mr. Widi says that the reason he included these counts in the Second Amended Complaint was to avoid a waiver argument. *Second Mot. for Recons.* at 12.

13. Count Thirteen: Illegal Probation Search Claim Against Denis Clark, Michael Lyon, Kevin Curran, and Theodore Short

In Count Thirteen of the Second Amended Complaint, Mr. Widi alleges that his rights were violated when Probation Officers Denis Clark and Michael Lyon and Eliot Police Detective Kevin Curran conducted an illegal probation search of his home. *Second Am. Compl.* at 45-46. He also asserts that Chief Short "was aware of the actions" taken by these three Defendants, and "acquiesced in, and authorized the

actions." *Id.* at 46. This is a restatement of Count Thirteen of the First Amended Complaint. *First Am. Compl.* at 18-19. In his motion for reconsideration, Mr. Widi points out that even though the Court granted the motion for summary judgment that was filed by Denis Clark and Michael Lyon, the claim remains pending against Detective Kevin Curran. *Second Mot. for Recons.* at 12-13. But he did not indicate that there were any substantive differences between Count Thirteen of the First Amended Complaint and Count Thirteen of the Second Amended Complaint. *See id.*

14. Count Fourteen: Civil RICO Claim Against Kevin Curran, Paul McNeil, Deputy Marshals John Does # 4 and # 5, the SPD, and Ryan Cortina

In Count Fourteen of the Second Amended Complaint, Mr. Widi reasserts the claim set forth in Count Twelve of the First Amended Complaint. *First Am. Compl.* at 15-18; *Second Am. Compl.* at 47-51. In his motion for reconsideration, Mr. Widi says that the Second Amended Complaint adds "new critical allegations about the enterprise, pattern of racketeering activity, and specific racketeering acts necessary to make a valid civil RICO claim against Curran and McNeil." *Second Mot. for Recons.* at 13. He adds Widi Tile Company, LLC as a plaintiff since Widi Tile Company, LLC was "not convicted of any wrongdoing" and "this claim is not subject to the bar of *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994)." *Id.* Finally, he notes that the RICO claim is still pending against Detective Curran. *Id.*

15. Count Fifteen: Interference with Compulsory Process Against Kevin Curran, Paul McNeil, Deputy Marshals John Does # 4 and # 5, the SPD Defendants, and Ryan Cortina

In Count Fifteen of his Second Amended Complaint, Mr. Widi restates Count Twelve of his First Amended Complaint. *First Am. Compl.* at 15; *Second Am. Compl.* at 52. In his motion for reconsideration, Mr. Widi agrees that his "amendments are insignificant." *Second Mot. for Recons.* at 13. Nevertheless, he said that he "did not want it deemed waived." *Id.* at 13-14.

16. Count Sixteen: Municipal Liability Against the town of Eliot and Theodore Short

In Count Sixteen of his Second Amended Complaint, Mr. Widi reframes Count Ten of the First Amended Complaint. *First Am. Compl.* at 14-15; *Second Am. Compl.* at 53-55. In his motion for reconsideration, Mr. Widi says that the "Second Amended Complaint makes new critical allegations . . . against the Town of Eliot" about the Eliot Police Department "conducting searches and seizures without probable cause or warrants, subjecting arrestees to excessive use of force, and redistributing lawfully held property without due process." *Second Mot. for Recons.* at 14. He claims this pattern establishes a failure of Eliot to properly train, supervise and discipline its officers. *Id.*

17. Count Seventeen: Right to Financial Privacy Against the United States Attorney's Office and TD Bank

In Count Seventeen of the Second Amended Complaint, Mr. Widi repeats his allegations about the United States Attorney's Office in Maine improperly demanding and TD Bank improperly revealing his private bank account information to a federal grand jury. *Second Am. Compl.* at 56-58. This Count repeats Count Eleven of the

First Amended Complaint and clarifies that it now attempts to state a claim against the U.S. Attorney's Office. *First Am. Compl.* at 15; *Second Mot. for Recons.* at 14-16.

18. Count Eighteen: Freedom of Information Act and Privacy Act Against the ATF, Executive Office of the United States Attorney, and the Office of Information Policy

In Count Eighteen of the Second Amended Complaint, Mr. Widi makes the same Freedom of Information and Privacy Act requests that are set forth in Count Fourteen of the First Amended Complaint. *First Am. Compl.* at 19-21; *Second Am. Compl.* at 59-62. Mr. Widi concedes that the "Second Amended Complaint makes no significant changes to this claim." *Second Mot. for Recons.* at 16.

III. DISCUSSION

A. Whether David J. Widi, Jr.'s Claims Are Sufficiently Meritorious to Survive Dismissal

1. The Earlier Orders

The Court extensively addressed the sufficiency of a number of the Counts in Mr. Widi's First and Second Amended Complaints and has ruled exhaustively on a number of Mr. Widi's theories. The Court reviews the status of these claims to determine the impact of the earlier orders on Mr. Widi's claims both in the pending First Amended Complaint and the proposed Second Amended Complaint.

a. Defendant Paul McNeil

On September 24, 2013, addressing the allegations in the First Amended Complaint, the Court concluded that Mr. Widi's claims against Agent McNeil in Counts I, II, III, IV, V, VI, VII, VIII, IX, and XII failed to state legally cognizable

claims.[6] *Order Denying Pl.'s Mot. to Stay; Denying Pl.'s Mot. to Strike; and Granting Def. McNeil's Mot. to Dismiss* (ECF No. 170) (*McNeil Dismissal Order*). As the Court dismissed all Counts against Agent McNeil, he was terminated as a defendant as of September 24, 2013. Mr. Widi's motion to amend the Amended Complaint filed on November 29, 2013 seeks to revive as against Agent McNeil a number of dismissed counts and to add two new ones. *Mot. for Leave to Amend* at 5-7.

In its September 24, 2013 Order, the Court addressed and dismissed the theories against Agent McNeil in Counts I and II of the First Amended Complaint (Count I of the Second Amended Complaint)—Unlawful Seizure of Mr. Widi; Count III of the First Amended Complaint (Count II of the Second Amended Complaint)—Excessive Force; Count IV of the First Amended Complaint (Counts III and IV of the Second Amended Complaint)—Illegal Sniff Search and Illegal Seizure of Van; Count V of the First Amended Complaint (Count VI of the Second Amended Complaint)—Omissions of Fact from the Search Warrant Affidavit; Count VI of the First Amended Complaint (Counts VIII and IX of the Second Amended Complaint)—the motorcycle seizure; Count VII of the First Amended Complaint (Count XI of the Second Amended Complaint)—False Evidence; Count VIII of the First Amended Complaint (Count XII of the Second Amended Complaint)—Right to counsel and right to be free from self-incrimination; Count IX of the First Amended Complaint (Count X of the Second Amended Complaint)—Defamation; and Count XII of the First Amended Complaint

[6] Counts X, XI, XIII, and XIV did not make any allegations against Agent McNeil, and the Court dismissed them as to him. *Order Denying Pl.'s Mot. to Stay; Denying Pl.'s Mot. to Strike; and Granting Def. McNeil's Mot. to Dismiss* at 34, 36.

(Counts XIV and XV of the Second Amended Complaint)—Civil RICO and Interference with Compulsory Process. Mr. Widi may not revive dismissed counts by moving to amend his Complaint.

His Second Amended Complaint sets forth two new Counts: Count V—Illegal search of the van (i.e., the second sniff), and Count VII—Illegal search of the grey trailer. *Second Am. Compl.* at 27-28, 30. Mr. Widi's case against Agent McNeil has now been pending for over two years. Agent McNeil filed a dispositive motion on October 15, 2012, which was elaborately briefed and resulted in a thirty-six page decision in favor of Agent McNeil. The Court will not allow Mr. Widi to pursue Agent McNeil on claims that, if timely brought, would have been dismissed, or that should have been brought years ago, long before Agent McNeil was dismissed from the case. Pursuant to its authority under 28 U.S.C. § 1915A and Federal Rule of Civil Procedure 15(a), the Court denies Mr. Widi's motion to amend complaint as against Defendant McNeil and, if the Second Amended Complaint were allowed, the Court would dismiss it as non-meritorious.

b. Defendant TD Bank

On September 25, 2013, in an eighteen-page opinion, the Court granted TD Bank's motion for summary judgment. *Order Granting Mot. for Summ. J. by Def. TD Bank; Denying Mot. to Strike; Denying Disc.; and Dismissing Without Prejudice Mot. for Serv. of Process* (ECF No. 171) (*TD Bank Order*). On November 29, 2013, Mr. Widi filed a motion for leave to amend the First Amended Complaint, attempting to revive the claim listed as Count XI in the First Amended Complaint under Count XVII in

the proposed Second Amended Complaint. *Mot. for Leave to Amend* at 4. Mr. Widi may not revive a claim that the Court has already dismissed by moving to amend his dismissed Complaint. Pursuant to its authority under 28 U.S.C. § 1915A and Federal Rule of Civil Procedure 15(a), the Court denies Mr. Widi's motion to amend complaint as against Defendant TD Bank and, if the Second Amended Complaint were allowed, the Court would dismiss it as non-meritorious.

c. Defendants Denis R. Clark and Michael Lyon

On April 21, 2014, the Court issued a twenty-page opinion, granting Defendants Clark and Lyon's motion for summary judgment as to Count XIII of his First Amended Complaint. *Order Granting the Renewed Mot. for Summ. J. by Defs. Clark and Lyon* (ECF No. 236) (*Clark and Lyon Order*). Mr. Widi's proposed Second Amended Complaint, which was filed before the April 21, 2014 Order, contains a Count XIII that echoes the allegations in Count XIII in the First Amended Complaint. In his motion to amend, Mr. Widi says that the allegations in Count XIII of the Second Amended Complaint provide "a more detailed account of the allegations against the Maine Probation Officers and the theories of liability." *Mot. for Leave to Amend* at 3. However, the facts underlying Mr. Widi's claims against Probation Officers Clark and Lyon were extensively developed during the summary judgment process. *See Clark and Lyon Order* at 4-8. Accordingly, there are no allegations in Count XIII in the Second Amended Complaint that the Court has not already considered. Pursuant to its authority under 28 U.S.C. § 1915A and Federal Rule of Civil Procedure 15(a), the Court denies Mr. Widi's motion to amend complaint as against Defendants Clark and

Lyon and, if the Second Amended Complaint were allowed, the Court would dismiss it as non-meritorious.

2. The False Arrest Counts

Counts One and Two of the First Amended Complaint and Count One of the Second Amended Complaint are premised on the allegation that law enforcement did not have the right to arrest Mr. Widi on November 28, 2008. *First Am. Compl.* at 4-5; *Second Am. Compl.* at 17-19. In Judge Singal's Order on the motion to suppress, he wrote, "[t]he Court does not question the officers' right to detain the Defendant while they were executing the search warrant." *Suppression Order* at 6. Judge Singal cited *Michigan v. Summers*, 452 U.S. 692, 705 (1981). In *Summers*, the United States Supreme Court upheld an arrest incident to the execution of a search warrant. *Id.*

It is true that in 2013, the United States Supreme Court decided *Bailey v. United States*, 133 S. Ct. 1031 (2013) in which it concluded that the *Michigan v. Summers* rule did not extend to defendants who were detained a distance away from the premises being searched, but this decision was well after Judge Singal's February 23, 2010 Order. *Id.* Whether *Bailey* would apply to the facts in this case is unclear. In *Bailey*, the police detained the defendants about a mile from the residence that was being searched. *Id.* at 1036. Here, the officers detained Mr. Widi at a gas station about 300 yards from his residence and he could have easily walked back to the residence. *Suppression Tr.* 9:8-10:6, 30:13-18, 53:5-14.

However, even assuming that *Bailey* would prohibit Mr. Widi's detention, for the reasons the Court described in detail in its Order granting Paul McNeil's motion

to dismiss, the officers involved in Mr. Widi's detention at the Irving station on November 28, 2008 are entitled to qualified immunity, which would bar the false arrest claims. *McNeil Dismissal Order* at 14-19.

The Court concludes that Counts One and Two of the First Amended Complaint and Count One of the Second Amended Complaint do not survive § 1915A screening.

3. Excessive Use of Force

In Count Three of the First Amended Complaint and Count Two of his Second Amended Complaint, Mr. Widi claims that law enforcement used excessive force when they handcuffed him too tightly during the ride from the gas station to his premises and while the search of his premises was taking place. *First Am. Compl.* at 5-6; *Second Am. Compl.* at 20-22. Based on the law as it existed at the time of the search, the police were justified in handcuffing Mr. Widi as they completed the warranted search of his premises. *Muehler v. Mena*, 544 U.S. 93, 95 (2005) ("We hold that Mena's detention in handcuffs for the length of the search was consistent with our opinion in *Michigan v. Summers*"). Moreover, based on ATF Special Agent McNeil's search warrant affidavit, the police had reason to believe that Mr. Widi, a convicted felon, had possession of numerous firearms and even some explosives, including olive green hand grenades, at his residence. *Mot. to Suppress* Attach. 1 *Appl. and Aff. for Search Warrant* at 4-5, No. 2:09-cr-00009-GZS (ECF No. 92). The situation in this case was therefore similar to *Mena*, where the Supreme Court noted that the police were executing a search warrant for weapons. *Mena*, 544 U.S. at 100

("[T]his safety risk inherent in executing a search warrant for weapons was sufficient to justify the use of handcuffs . . . ."). Finally, Mr. Widi was detained as the person whose premises were subject to the search for a relatively short period of time, and once the police found marijuana and ammunition in his residence, they formally arrested him. *Suppression Tr.* 13:23-14:10 (Special Agent McNeil confirming that he formally arrested Mr. Widi less than fifteen minutes after they began executing the search).

Even though the law authorizes the use of handcuffs during the execution of a search warrant, particularly where there is a safety risk to the searching officers, the First Circuit has expressed the view that "there are special concerns raised when handcuffs hurt the person cuffed." *Mlodzinski v. Lewis*, 648 F.3d 24, 36 (1st Cir. 2011). The *Mlodzinski* Court quoted Justice Kennedy in his *Mena* concurrence:

> If the search extends to the point when the handcuffs can cause real pain or serious discomfort, provision must be made to alter the conditions of detention at least long enough to attend to the needs of the detainee. . . . The restraint should also be removed if, at any point during the search, it would be readily apparent to any objectively reasonable officer that removing the handcuffs would not compromise the officers' safety or risk interference or substantial delay in the execution of the search.

Id. (quoting *Mena*, 544 U.S. at 103) (Kennedy, J., concurring).

Mr. Widi alleges in his First and Second Amended Complaints that the handcuffs were too tight, causing him unbearable pain both while he was in the police cruiser and while he was standing watching the police execute the search. *First Am. Compl.* at 6; *Second Am. Compl.* at 22. He says he complained to Officer Robert Brown, the officer who placed the handcuffs on him, and that Officer Brown refused

to loosen the handcuffs despite Mr. Widi's complaints. *First Am. Compl.* at 5-6; *Second Am. Compl.* at 21-22. Mr. Widi maintains that as a consequence of the tightness of the handcuffs, he still has pain in his wrist to this day. *Id.* He also claims that he complained to other officers who failed to intervene and require Officer Brown to loosen the handcuffs. *Id.*

Based on its prior dealings with Mr. Widi, the Court is deeply skeptical about his allegations. In Mr. Widi's other civil lawsuit, the Court had the benefit of a videotape that captured all of Mr. Widi's actions from the time he entered the Maine State Prison until the time that the tuberculosis test was completed. *See Widi v. United States Dep't of Justice*, No. 1:11-cv-00113-JAW. The difference between Mr. Widi's allegations about what happened at the Maine State Prison and what was revealed on the DVD was so stark and so extreme that the Court dismissed his Complaint in its entirety. *Order Dismissing Case*, No. 1:11-cv-00113-JAW (ECF No. 118).

Here, there is no DVD, which would be positive proof of what actually occurred. During his testimony at the suppression hearing, Detective Curran of the Eliot Police Department testified in passing about Mr. Widi's complaints about the tightness of the handcuffs while he was sitting in the cruiser. *Suppression Tr.* 69:10-22. Detective Curran testified that Mr. Widi complained to Detective Curran that sitting in the cruiser with the handcuffs was uncomfortable. *Id.* As a result, Detective Curran allowed Mr. Widi to stand outside the cruiser, still with the handcuffs on. *Id.* 69:23-70:2. There is nothing in the transcript of the suppression hearing that speaks to

whether Mr. Widi continued to complain about his handcuffs after he was allowed to stand outside the cruiser. It is possible that Mr. Widi complained of the tightness of the handcuffs while sitting in the police cruiser and that Detective Curran responded to his complaint by allowing him to stand outside the cruiser, at which point Mr. Widi no longer complained about his handcuffs.

Despite its substantial reservations, the standards under § 1915A restrict the Court's ability to find facts at this point and the Court will authorize service upon Officer Robert Brown of the Eliot Police Department for his alleged use of excessive force against Mr. Widi as a result of his overtight application of handcuffs.[7] Mr. Widi's allegations against Detective Kevin Curran of the Eliot Police Department are currently pending. By its order dated September 27, 2013, the Court dismissed his handcuff allegations against Special Agent Paul McNeil. *McNeil Dismissal Order* at 19-21. Mr. Widi may not resurrect a dismissed case by a post-dismissal amended complaint.

Mr. Widi also makes allegations in the Second Amended Complaint against Eliot Police Officer Elliot Moya, claiming that Officer Moya drove with Officer Brown from the gas station to the Widi residence and that Mr. Widi complained while en route that his handcuffs hurt and that Officer Moya could have loosened the handcuffs but failed to do so. *Second Am. Compl.* at 21. Mr. Widi makes no other

[7] The Court wonders whether over time, the standards for handcuff cases against law enforcement will be tightened. It is not unusual for a prisoner to complain that handcuffs are too tight and for some, handcuffs are too tight if they cannot be slipped. If the complaint alone is sufficient to survive a § 1915A screening, police officers will be required to defend cases that should properly be screened. This is not to say that where the police apply handcuffs so tightly that they cause real injury and refuse to loosen them after complaint, the officers should be immune from suit. Some slightly heightened standard, such as requiring more than subjective complaints of discomfort, might emerge.

allegations against Officer Moya and the Court concludes that these allegations are insufficient to implead Officer Moya. The trip here is a three hundred-yard ride from the gas station to Mr. Widi's residence. The fact that Mr. Widi complained of discomfort during that brief ride is not of constitutional dimension.

Finally, in his Second Amended Complaint, Mr. Widi makes allegations against Lieutenant Kevin Cady of the Eliot Police Department. *Id.* at 22. He alleges that while he was standing in handcuffs next to the cruiser at the Widi residence, Lieutenant Cady approached him and he complained to Lieutenant Cady that his handcuffs were too tight, but Lieutenant Cady failed to take any action. *Id.* Furthermore, Mr. Widi charges that as a lieutenant in the EPD, Lieutenant Cady had the authority to order Officer Brown to loosen the handcuffs and that Lieutenant Cady had keys that would have allowed him to loosen the handcuffs. *Id.* Based on these allegations, the Court concludes that Mr. Widi has stated a claim in his Second Amended Complaint against Lieutenant Cady that survives § 1915A screening and the Court orders service of process on Lieutenant Kevin Cady.

4. Counts Three and Five: Illegal Sniff Search

In his Second Amended Complaint, Mr. Widi alleges that the police conducted two sniff searches of his company van, first when parked in his yard and next after it was seized. *Id.* at 23-24, 27-28. Mr. Widi's theory that law enforcement's use of a trained narcotics detection dog to sniff his company van constitutes a violation of his constitutional rights runs counter to well-established precedent. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (use of a drug detection dog during a legitimate traffic stop

"does not rise to the level of a constitutionally cognizable infringement"); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) ("The fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search"); *United States v. Place*, 462 U.S. 696, 707 (1983) (use of drug sniffing dog to screen luggage is not a search within the meaning of the Fourth Amendment). The Court concludes that neither Count Three nor Count Five survives § 1915A screening.

5. Counts Four and Six: Illegal Seizure of Van and Omission of Probable Cause Factors to State

In Count Four of the Second Amended Complaint, Mr. Widi charges that law enforcement illegally seized his company van, which contained his business papers, including a contract. *Second Am. Compl.* at 25-26. Specifically, he lists Widi Tile Company, LLC as a party plaintiff and asserts claims on its behalf. *Id.* at 2. In Count Six, Mr. Widi alleges that when law enforcement executed an affidavit in support of their search of his company van, they failed to include the first failed dog sniff test. *Id.* at 29. Mr. Widi claims that the incomplete affidavit led to the issuance of a search warrant of the company van by a state judge. *Id.* In both counts, Mr. Widi is attempting to raise claims on behalf of Widi Tile Company, LLC.[8]

This he may not do. Under 28 U.S.C. § 1654, the law provides that "the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." *Id.*

[8] For example, in Count Four, although Mr. Widi says that he suffered unspecified damages due to a violation of his constitutional rights, he claims specific damages on behalf of his business, such as the inability to complete tile jobs and to enforce contracts. *Second Am. Compl.* at 26.

In *O'Diah v. Volkswagen of Am., Inc.*, the First Circuit noted that "[w]e have interpreted this statute as barring a non-lawyer from representing anyone but himself." 91 Fed. Appx. at 160. This prohibition has been extended to bar individuals who are not attorneys from representing limited liability companies, corporations and partnerships in civil actions. *Hooper-Haas v. Ziegler Holdings, LLC*, 690 F.3d 34, 36 n.2 (1st Cir. 2012) ("[L]imited liability companies, like corporations, cannot litigate pro se"); *Strong Delivery Ministry Ass'n v. Bd. of Appeals of Cook Cnty.*, 543 F.2d 32, 32-34 (7th Cir. 1976) (corporations); *Eagle Assocs. v. Bank of Montreal*, 926 F.2d 1305 (2d Cir. 1991) (partnerships). By the allegations in the Second Amended Complaint, Mr. Widi does not own the van; Widi Tile Company, LLC does. *See, e.g.*, *Second Am. Compl.* at 25 ("At the Eliot Police Station, Cady attempted to get Mr. Widi's consent to allow the ATF and members of the search team to search his tile company van"). Accordingly, Mr. Widi, who is not a lawyer, may not represent a limited liability company in a civil action. It is true that Mr. Widi has repeatedly asked the Court for appointed counsel. But the statutory provision that allows a prisoner to proceed in forma pauperis and authorizes a court to appoint counsel does not extend to limited liability companies. *See* 28 U.S.C. § 1915(e)(1); *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 196 (1993) ("[O]nly a natural person may qualify for treatment *in forma pauperis* under § 1915").

The Court concludes that Counts Four and Six of the Second Amended Complaint in support of a limited liability company's claim do not survive § 1915A screening as to the non-served Defendants. As the Magistrate Judge ruled that Mr.

Widi's claims against Special Agent Curran survive § 1915A screening, the Court will not revise that earlier ruling as against Special Agent Curran. However, Counts Four and Six of the Second Amended Complaint do not survive § 1915A screening as to the remaining Defendants.

6. Count Seven: Illegal Search of the Grey Trailer

In Count Seven, Mr. Widi alleges that law enforcement illegally searched his grey trailer. *Second Am. Compl.* at 30. Here, the allegations are so vague that they do not meet § 1915A standards. Unlike his other counts, Mr. Widi does not state when law enforcement searched his grey trailer, who among the law enforcement officers searched his trailer, and what happened to the trailer following the search. *Id.* Such vague allegations do not permit the Court to authorize suit. Thus, for example, based on these allegations, the Court would not know which officers among the twenty-four ATF, MDEA, EPD and MSP officers listed in the Second Amended Complaint were involved in the search and the allegations in Count Seven do not justify lawsuits against the law enforcement agencies themselves.

7. Counts Eight and Nine: Illegal Seizure of Neil Vaccaro's Motorcycle

In Count Eight and Count Nine, Mr. Widi spins a bizarre tale about law enforcement officers conspiring with Defendant Neil B. Vaccaro to seize Mr. Vaccaro's motorcycle, which Mr. Widi claims he held as collateral for a $5,000 loan that Mr. Widi earlier made to Mr. Vaccaro. *Id.* at 31-35. The allegations in Counts Eight and Nine are simply too fanciful to generate a federal cause of action. Moreover, for the reasons the Court discussed in its McNeil Dismissal Order, Mr. Widi's claim in

Counts Eight and Nine are also barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). *McNeil Dismissal Order* at 25-26.

The Court concludes that Counts Eight and Nine do not withstand § 1915A scrutiny.

8. Count Ten: Unconstitutional Defamation/Libel

Count Ten is premised on the contention that Chief Short of the EPD knew it was false when he informed the media that the search of Mr. Widi's premises had uncovered a stolen motorcycle and that he was "ready for war," "preparing for the end of the world," and had been "stockpiling firearms and explosives." *Second Am. Compl.* at 36-38. However, turning to the stolen motorcycle, the Second Amended Complaint alleges that Chief Short was relying on statements from Mr. Vaccaro, who owned the motorcycle. *Id.* at 36. The Court already declined to proceed with the odd allegations about a police conspiracy with Mr. Vaccaro and on this point, the defamation claim appears to be related to this bizarre conspiracy theory.

The statements about Mr. Widi being ready for war, preparing for the end of the world, and stockpiling firearms are set forth in the search warrant affidavit and reflect statements that two confidential informants made to law enforcement about statements that Mr. Widi allegedly made. *See Appl. and Aff. for Search Warrant* at 7. These statements, if made by the Chief, do not amount to defamation or libel and Count Ten does not meet § 1915A standards. Furthermore, as the statements formed part of the probable cause for the issuance of the search warrant and the Court rejected a request to suppress the search, Mr. Widi may not challenge the

underpinning of the search warrant under *Heck*. In addition, for the reasons stated in its McNeil Dismissal Order, the defamation and libel allegations would fail because each Defendant would be entitled to qualified immunity. *McNeil Dismissal Order* at 30-34. Regarding Agent McNeil, in the Second Amended Complaint, Mr. Widi impermissibly seeks to revive his case against Agent McNeil, which the Court previously dismissed.

9. Count Eleven: False Evidence

For the reasons set forth in this Court's McNeil Dismissal Order, Mr. Widi's false evidence claims are barred by *Heck*. *Id.* at 27-28. The Court concludes that Count Eleven does not survive § 1915A screening.

10. Count Twelve: Deprivation of Counsel/Self-Incrimination

For the reasons set forth in this Court's McNeil Dismissal Order, Mr. Widi's deprivation of counsel/self-incrimination claims are barred by *Heck*. *Id.* at 28-29. The Court concludes that Count Twelve does not survive § 1915A screening.

11. Count Thirteen: Unlawful Probation Search

On April 21, 2014, the Court issued a twenty-page opinion, granting Defendants Clark and Lyon's motion for summary judgment as to Count XIII of his First Amended Complaint. *Clark and Lyon Order*. There are no allegations in the Second Amended Complaint that would affect this Court's dismissal of Count XIII as against Defendants Clark and Lyon. In addition, Mr. Widi's conclusory allegations against Chief Short (i.e., that he "acquiesced in" the actions of the officers under his supervision) do not survive § 1915A screening because these allegations are

insufficient to impose supervisory liability. This Count remains pending against Detective Kevin Curran.

12. Count Fourteen: Civil RICO

In its McNeil Dismissal Order, the Court concluded that Mr. Widi's Civil RICO claim against Agent McNeil was barred by *Heck*. *McNeil Dismissal Order* at 35-36. The same logic applies to the remaining Defendants. The Court concludes that Count Fourteen does not survive § 1915A screening.

13. Count Fifteen: Interference with Compulsory Process

The alleged facts underlying Mr. Widi's compulsory process claim are identical to those previously discussed by the Court in its McNeil Dismissal Order regarding Count XIV. *Compare McNeil Dismissal Order* at 34-35 *with Second Am. Compl.* at 52. As the Court dismissed Count XIV against Agent McNeil based on *Heck*, the same logic applies to the remaining Defendants under Count XV. The Court concludes that Count Fifteen does not survive § 1915A screening.

14. Count Sixteen: Municipal Liability

In Count Sixteen, Mr. Widi first claims that the EPD adopted a policy of conducting searches and seizures without warrants or probable cause. *Second Am. Compl.* at 53. Mr. Widi bases his claim against EPD in part on his allegations in Count I, Counts III and V, Count IV, Count VII, Count VIII, and Count XIII. *Id.*

A § 1983 claim against a municipality, as opposed to one of the officers, may proceed only if the municipality itself causes the constitutional violation in question. *Canton v. Harris*, 489 U.S. 378, 385 (1989). Specifically, the town of Eliot may be

liable under § 1983 "only where the failure to train amounts to deliberate indifference to the rights of the persons with whom the police come into contact." *Id.* at 388. None of Mr. Widi's claims underlying his § 1983 claim against the town of Eliot has survived § 1915A screening, and therefore, to the extent his claim is based on failed claims, he does not state a § 1983 claim against the EPD.

Regarding his claim that the EPD had adopted a policy or practice to use excessive force by applying overtight handcuffs on arrestees, Mr. Widi cites one case from the Maine Supreme Judicial Court in 2001 in which the Law Court noted that the plaintiff in a § 1983 lawsuit against the town of Eliot claimed that the police applied her handcuffs too tightly. *Second Am. Compl.* at 53 (citing *Richards v. Town of Eliot*, 2001 ME 132, 780 A.2d 281, 286). However, this case, which arose out of an incident in 1996, twelve years before Mr. Widi's claim, did not involve any of the officers who were involved in Mr. Widi's case. *See Richards*, 2001 ME 132, ¶¶ 3-5, 780 A.2d 281 (Officers Michael Stacy and Wayne Godfrey were involved). Furthermore, the Maine Supreme Judicial Court concluded that the plaintiff's claim in that case did not meet § 1983 standards and it upheld the dismissal of the town. *Id.* ¶¶ 38-39. There is no grounds to conclude that the application of Mr. Widi's handcuffs at the gas station and at his residence reflected a departmental policy to apply overtight handcuffs on detainees and arrestees.

As Mr. Widi's claim is based on dismissed or insufficient allegations, the Court concludes that Count Sixteen against the town of Eliot does not survive § 1915A screening.

15. Count Seventeen: Right to Financial Privacy

On September 25, 2013, in an eighteen-page opinion, the Court granted TD Bank's motion for summary judgment. *TD Bank Order*. Mr. Widi may not amend his Complaint to include allegations against a dismissed defendant.

16. Count Eighteen: FOIA/PA Demand

This Count remains pending.

B. The Motion to Amend the Amended Complaint: Rule 15(a) Standards

Motions for leave to amend are governed by Rule 15(a), which provides that leave to amend "should [be] freely give[n] . . . when justice so requires." FED. R. CIV. P. 15(a)(2). Thus,

> [i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.—the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962); *see also Abraham v. Woods Hole Oceanographic Inst.,* 553 F.3d 114, 117 (1st Cir. 2009) (noting that leave should be granted "unless the amendment would be futile or reward undue delay"). Generally, an amendment will be deemed futile if "the complaint, as amended, would fail to state a claim upon which relief could be granted." *Glassman v. Computervision Corp.*, 90 F.3d 617, 623 (1st Cir. 1996). "In assessing futility, the district court must apply the standard which applies to motions to dismiss under 12(b)(6)." *Adorno v. Crowley*

Towing & Trans. Co., 443 F.3d 122, 126 (1st Cir. 2006) (citing *Glassman*, 90 F.3d at 623).

C. Motion to Stay

On December 22, 2014, Mr. Widi filed yet another motion to stay the proceedings. *Mot. to Stay Proceedings* (ECF No. 269). The basis of the motion was that Mr. Widi was without his legal materials so he could not respond to the Court's determination to perform a § 1915A screening of the unscreened Defendants. *Id.* at 1-3. Mr. Widi has filed a sixty-nine page Second Amended Complaint and he has filed an eighteen-page motion for reconsideration, explaining the need for the Second Amended Complaint. The Court first assumes that Mr. Widi's problems with access to legal materials have been resolved by now, and second, the Court concludes that it would not benefit from a further filing from Mr. Widi explaining why the motion to reconsider the denial of his motion to file a second amended complaint should be granted.

IV. CONCLUSION

The Court is left with the following represented Defendants: Detective Kevin Curran of the EPD, and the United States, ATF, the EOUSA, and the OIP (on Count XIV of the First Amended Complaint only).

Based on its review of the merits of the proposed Second Amended Complaint, the Court GRANTS IN PART and DENIES IN PART Mr. Widi's Motion for Reconsideration of Order Denying Leave to File Second Amended Complaint and Request for Status Conference (ECF No. 261).

As the Second Amended Complaint contains allegations that complete some of the allegations in the First Amended Complaint, the Court VACATES IN PART its December 10, 2014 Order Dismissing Plaintiff's Motion for Relief Pursuant to Federal Rule of Civil Procedure 54(b), Denying in Part and Granting in Part Plaintiff's Motion for Reconsideration, Denying Request for Status Conference and Granting Motion to Extend Time (ECF No. 268). The Court VACATES so much of that Order that denied the motion for leave to file a Second Amended Complaint against the served Defendants. The basis of the vacatur of the December 10, 2014 Order is that it is wiser to have all the parties operating under the same complaint and, in this Order, the Court has allowed Mr. Widi's Second Amended Complaint to proceed against Officer Robert Brown and Lieutenant Kevin Cady.

To create uniformity among the Defendants, the Court GRANTS the Motion for Leave to Amend (ECF No. 198) to file a Second Amended Complaint regarding Count Two (the Excessive Force claim), Count Thirteen (the Unlawful Probation Search claim) as against Detective Kevin Curran only, and Count Eighteen (the FOIA/PA claim). In accordance with Federal Rule of Civil Procedure 15(a)(3), Detective Kevin Curran and ATF, the EOUSA, and the OIP shall file their answers to the Second Amended Complaint within fourteen (14) days of the date of this Order. The Court STRIKES Counts One, Three, Five, Seven, Eight, Nine, Ten, Eleven, Twelve, Fourteen, Fifteen, Sixteen and Seventeen of the Plaintiff's Second Amended Complaint. The Court STRIKES IN PART Counts Four and Six of the Plaintiff's Second Amended Complaint.

Regarding Count Two, the Court concludes that Mr. Widi has stated a potential claim against Officer Robert Brown and Lieutenant Kevin Cady of the Eliot Police Department and instructs the Clerk's Office to prepare the required documents for service of the Second Amended Complaint against Robert Brown and Kevin Cady.

The Court DENIES David J. Widi, Jr.'s Motion to Stay Proceedings (ECF No. 269).

SO ORDERED.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
UNITED STATES DISTRICT JUDGE

Dated this 11th day of February, 2015

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